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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the McCUNE REVOCABLE LIVING TRUST DATED JUNE 6, 1989	)	2 CA-CV 2009-0135 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. PB20040073

Honorable Charles V. Harrington, Judge

AFFIRMED

Mark McCune — Tucson
In Propria Persona

Duffield Adamson Helenbolt & Fletcher, P.C.
By K. Alexander Hobson — Tucson
Attorneys for Respondent/Appellee

E C K E R S T R O M, Presiding Judge.

¶1 Appellant, trust beneficiary Mark McCune, appeals from the trial court's grant of summary judgment in favor of appellee Sigrid McCune, the surviving trustee of the McCune Revocable Living Trust (McCune Trust) and trustee of the Alfred L. McCune Trust and the Qualified Terminable Interest Property (QTIP) Trust. Mark contends he presented evidence that raised genuine issues of material fact about Sigrid's management of, and accounting for, trust assets. For the reasons that follow, we affirm the judgment.

Factual and Procedural Background

¶2 Alfred and Sigrid McCune were married in 1976. Mark is one of Alfred's sons from a prior marriage. In 1989, Alfred and Sigrid created the McCune Trust. According to its terms, upon the death of either Sigrid or Alfred, the trustee was to divide the balance of the trust assets into two separate trusts: the Alfred L. McCune Trust and the QTIP trust. The Alfred L. McCune Trust would then contain two parcels of real property—a residence on McKinley Road and a commercial property on Craycroft Road—and the remaining assets from the McCune Trust would be transferred into the QTIP Trust. The assets in the QTIP Trust were to be held in trust for the surviving spouse until his or her death, at which time they would be distributed equally to three beneficiaries: Mark, his brother Michael McCune, and Sigrid's daughter Erika Counseller.

¶3 Alfred died on August 30, 2001. In late 2003, Mark filed a petition against Sigrid as trustee.[1] In it, he asserted claims for breach of trust, unjust enrichment, and waste. He sought an accounting, removal of Sigrid as trustee, and the imposition of a constructive trust and a surcharge. After more than five years of litigation, Sigrid moved for summary judgment in March 2009. Sigrid argued Mark could not show a genuine issue of material fact existed on the only issue remaining from Mark's original petition—whether trust assets were missing at the time of his father's death.[2]

¶4 Mark filed no written response to the motion. A hearing was held in May 2009, at which Mark appeared, argued, and presented documents in support of his

[1]Mark entitled the document a "petition for breach of trust, for removal of trustee, for waste, for surcharge, for constructive trust, and for unjust enrichment and order to show cause."

[2]Mark did not dispute that this was the only remaining issue. The record reflects that, in 2005, the trial court entered summary judgment against Mark, finding that Sigrid was entitled to the rent from the Craycroft property until the lease expired in December 2005 and that the deeds conveying two parcels of real property to her as trustee were titled properly. The court denied Mark's request to remove Sigrid as trustee. And, finally, it ordered Sigrid's counsel to provide Mark "a full accounting of the QTIP assets," including for the period "beginning 2 months prior to Alfred McCune's death." Sigrid filed a complete accounting immediately thereafter. In August 2006, this court affirmed the judgment. *See In re McCune Revocable Living Trust Dated June 6, 1989*, Nos. 2 CA-CV 2005-0020, 2 CA-CV 2005-0223 (consolidated) (memorandum decision filed Aug. 10, 2006). In that appeal, Mark did not object to the accounting Sigrid had provided other than to complain it did not cover a greater time period before his father's death. Because that issue had not been raised below, we did not address it on appeal. Additionally, we found Mark had "produced no actual evidence that Sigrid has committed any malfeasance that might justify removing her as trustee." Thus, we concluded, the trial court had not abused its discretion in denying Mark's request to remove her as trustee.

argument. The court granted summary judgment in favor of Sigrid and ordered Mark to pay her attorney fees in the amount of $13,555.50. This appeal followed.[3]

Discussion

¶5 Mark argues the trial court committed reversible error when it granted summary judgment against him. Specifically, he contends nine exhibits he offered at the hearing on the motion raised genuine issues of material fact and "proved the trustee Sigrid Mc[C]une breach[ed] her duty as Trustee and did not supply 4 years of Qtip Trust accountings, [a]nd the partial 2004 and 2005 accountings were inaccurate and that [a]ssets were in fact missing from the 2001 McCune Qtip trust."

¶6 "On appeal from a summary judgment, we view the facts in the light most favorable to the party against whom judgment was entered and draw all justifiable inferences in its favor." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, ¶ 2, 212 P.3d 853, 855 (App. 2009). "'However, we consider as true those facts alleged by [the moving party]'s affidavits that [the nonmoving party] did not controvert.'" *Id.*, *quoting Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 3, 123 P.3d 186, 188 (App. 2005) (alteration in *Modular Mining*).

¶7 In deciding a motion for summary judgment under Rule 56(c)(1), Ariz. R. Civ. P., a trial court considers "those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file which are brought to the court's

[3]To the extent Mark attempts to challenge the trial court's order of September 8, 2008, denying him accountings for the years 2006 through 2008, we have no jurisdiction over that order as it is not part of the final judgment appealed from in this case. *See Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978).

attention by the parties." *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 261, 469 P.2d 493, 495 (1970); *accord Tilley v. Delci*, 220 Ariz. 233, ¶ 10, 204 P.3d 1082, 1085 (App. 2009). None of the documents Mark presented at the hearing are the type of evidence a trial court may consider under Rule 56(c)(1). Nor have any of them been incorporated into an affidavit pursuant to Rule 56(e). *See Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990) (unsworn assertions of fact in opposition to summary judgment insufficient to defeat motion).

¶8 On appeal, Mark has attached documents to his brief he contends are copies of the exhibits he presented at the hearing on the motion for summary judgment and asks us to consider them in deciding whether summary judgment should have been granted.[4] He asserts the documents with circled numbers and handwritten notes in the margins make "clear to any one that Sigrid has been raiding the Qtip trust for years." Not only is the legal significance of these documents unclear, but Mark has not shown us where, or whether, these documents can be found in the record on appeal. Thus, we do not consider them. *See In re Property at 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 11, 64 P.3d 843, 846-47 (App. 2003) (materials attached to brief not incorporated into record on appeal); *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993) (court considers only record on appeal).

[4]Because the documents to which Mark referred at the hearing on the motion for summary judgment were never made part of the trial court record, we do not know if they are the same as those he has attached to his brief on appeal.

¶9 In short, Mark has proffered no competent evidence to rebut Sigrid's avowals the accounting was accurate and no assets are missing from the trust. In fact, Mark concedes he had disagreements with two different attorneys, in part because they believed the accounting was correct and Sigrid would prevail on any challenge to her actions as trustee.

¶10 We need not comb the record further in search of facts that might defeat the motion for summary judgment. *See Mast v. Standard Oil Co. of Cal.*, 140 Ariz. 1, 2, 680 P.2d 137, 138 (1984) ("[N]either we, the trial court, nor the court of appeals should be required to perform counsel's work by searching the record to attempt to discover facts which establish or defeat the [summary judgment] motion."); *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) ("We are not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate an appellant's claims."). Moreover, the record here shows the trial court reviewed the entire record before granting summary judgment. *See Chanay v. Chittenden*, 115 Ariz. 32, 37, 563 P.2d 287, 292 (1977) (holding "entire record must be examined" by trial court before granting summary judgment). Mark has not shown that any genuine issue of material fact remains for trial. Thus, the court did not err when it granted summary judgment against him. *See* Ariz. R. Civ. P. 56(e) (if party adverse to summary judgment fails to respond as provided by rule, "summary judgment, if appropriate, shall be entered against the adverse party").

¶11 Mark also asks this court to "strike the $13,555 penalty against [him]," essentially claiming the trial court abused its discretion when it awarded Sigrid attorney

fees pursuant to A.R.S. § 12-349 and Rule 11, Ariz. R. Civ. P., as a sanction for his litigation tactics. Although the record before us contains ample support for such a sanction in any event, Mark has set forth no standard of review, supporting argument or authority, or citation to the record for this argument. *See* Ariz. R. Civ. App. P. 13(a)(6) (specifying requirements for arguments in appellate brief). Thus, we need not address it further. *See Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting argument not complying with Rule 13).

Disposition

¶12 Affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge